WONG KENG LIANG A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
LOW HOP BING JCA
KN SEGARA JCA
AZAHAR MOHAMED JCA
[CRIMINAL APPEAL NO: B-09(S)-30-2011]
22 FEBRUARY 2012 C

CRIMINAL PROCEDURE: *Sentencing - Principles - Offence under s. 10(a) of International Trade in Endangered Species Act 2008 - Accused pleaded guilty - Whether sentence of five years imprisonment excessive - Whether serious offence warranting maximum custodial sentence - Whether mitigating factors considered* D

JURISDICTION: *Magistrate's Court - Sentencing - Offence under s. 10(a) of International Trade in Endangered Species Act 2008 - Accused pleaded guilty - Whether sentence of five years imprisonment excessive - Whether serious offence warranting maximum custodial sentence - Whether mitigating factors considered - Subordinate Courts Act 1948, s. 87* E

The accused was charged in the Magistrate's Court for an offence under s. 10(a) of the International Trade in Endangered Species Act 2008 ('the Act'), to wit, exporting without permit 95 Boa Constrictor snakes ('the snakes') which belong to a scheduled species in the Third Schedule, Appendix 2 of the Act. The accused had pleaded guilty without reservation and unconditionally to the offence. The facts as admitted by the accused was that he had failed to show any permit under the said Act to export the snakes which were seized at the Kuala Lumpur International Airport Terminal. In his mitigation, it was submitted for the accused that: (i) he had pleaded guilty as a first offender, thus saving judicial time and costs of calling the witnesses; (ii) he had repented and was remorseful; (iii) he had apologised and promised not to repeat the offence in future; (iv) there were no aggravating factors to merit a heavy sentence; (v) there was no use of criminal force; (vi) the accused had a permit to import the snakes but did not have an export permit; and (vii) the snakes were found in good conditions and no loss was caused to anybody. The prosecution pressed for a deterrent sentence by way of custodial F G H I

A sentence, in addition to fine on the grounds, *inter alia*, the offence was a serious offence involving protected species of wild life which could bring the extinction of the species. The prosecution also submitted that Malaysia should not be made a transit point in the eyes of the international community and that this was the first case
B of the accused in Malaysia. The learned Magistrate, upon considering the circumstance of the case, accepted the guilty plea by the accused and convicted and sentenced him to six months imprisonment and a fine totalling to RM190,000 and in default, 12 months imprisonment. However, the High Court in allowing the
C prosecution's appeal, set aside the sentence and substituted it with a five-year imprisonment term, without a fine and ordered that the RM190,000 to be refunded to the accused. Hence this appeal by the accused, which raised a question of immense public importance, particularly in relation to the fundamental principles of
D sentencing.

Held (allowing appeal)
Per Low Hop Bing JCA delivering the judgment of the court:

E **(1)** The accused, being charged in the Magistrate's Court, the sentencing jurisdiction of the Magistrate's Court under s. 87 of the Subordinate Courts Act 1948 applied, which provided for a maximum sentence of five years imprisonment and a fine of RM10,000.

F **(2)** The High Court judge, in imposing a five-year imprisonment term awarded the maximum custodial sentence which the Magistrate's Court as the sentencing court could impose under the law. This kind of maximum sentence is legally reserved for the most serious offence, without any mitigating
G factor. The learned High Court Judge also had not taken into consideration the guilty plea by the accused. Thus, appellate intervention was warranted.

(3) It is trite law that the guilty plea of the accused is a
H mitigating factor; (*PP v. Sau Soo Kim,* refd; *Melvani v. PP,* refd. Being a "first offender" had also been considered as a mitigating factor. The guilty plea by the accused allowed the court to exercise the discretion to give a discount or reduction of one-quarter or one-third of the sentence which would have
I been imposed after a full trial.

(4) Further, the learned judge had erroneously taken into consideration the facts which were not part of the admitted facts and facts which were not in the charge preferred against the accused.

(5) The accused in the instant case was charged with an offence of exporting the snakes without a permit and not charged with "trafficking" in wild life. He had lawfully imported the animals and had not smuggled them into the country. There was also no evidence to suggest that he would not have been granted the permit to export the animals by the authorities and neither was there evidence to suggest that he intentionally did not apply for the permit because he knew that he would not be granted with the permit.

(6) The accused had spent 17 1/2 months in prison as there was no stay of execution of the custodial sentence granted by the High Court. In allowing the appeal, the court set aside the five year custodial sentence imposed by the High Court and substituted it with a sentence of 17 1/2 months. The order of the High Court setting aside the fine was affirmed as the fine was plainly beyond the maximum fine which could be legally imposed by the Magistrate.

Bahasa Malaysia *Translation Of Headnotes*

Tertuduh dituduh di Mahkamah Majistret bagi satu kesalahan di bawah s. 10(a) Akta Perdagangan Antarabangsa Mengenai Spesies Terancam 2008 ('Akta'), iaitu, mengeksport tanpa permit 95 ekor ular jenis Boa Constrictor ('ular-ular tersebut') yang terangkum dalam spesies berjadual dalam Jadual Ketiga, Apendiks 2 Akta. Tertuduh mengaku bersalah tanpa keraguan dan tanpa syarat kepada kesalahan tersebut. Fakta-fakta yang diakui oleh tertuduh adalah bahawa dia gagal menunjukkan apa-apa permit di bawah Akta untuk mengeksport ular-ular tersebut yang dirampas di Terminal Lapangan Terbang Antarabangsa Kuala Lumpur. Di dalam mitigasi, dihujahkan bagi pihak tertuduh bahawa: (i) dia telah mengaku bersalah sebagai pesalah kali pertama, dengan itu menjimatkan masa dan kos mahkamah memanggil saksi; (iii) dia telah menyesal; (iii) dia telah memohon maaf dan berjanji untuk tidak mengulangi kesalahan tersebut pada masa hadapan; (iv) tidak ada faktor-faktor memburukkan yang mewajarkan hukuman yang lebih berat; (v) tidak ada penggunaan kekerasan jenayah; (vi) tertuduh mempunyai permit untuk mengimport tetapi tidak

A mempunyai permit eksport; dan (vii) ular-ular tersebut didapati dalam keadaan yang baik dan tidak ada kerugian kepada sesiapa. Pihak pendakwaan memohon hukuman yang lebih berat dengan hukuman pemenjaraan, ditambah dengan denda atas alasan, antara lain, kesalahan tersebut adalah kesalahan yang serius yang B melibatkan spesies hidupan liar yang boleh mengakibatkan kepupusan spesies tersebut. Pihak pendakwaan juga menghujah bahawa Malaysia tidak boleh dijadikan laluan transit pada mata masyarakat antarabangsa dan bahawa ini adalah kes pertama tertuduh di Malaysia. Yang arif Majistret, selepas C mempertimbangkan hal keadaan kes, menerima pengakuan bersalah tertuduh dan mensabitkan dan menghukumnya dengan enam bulan penjara dan denda dengan jumlah keseluruhannya adalah RM190,000 dan jika gagal membayar, dengan 12 bulan penjara. Walau bagaimanapun, Mahkamah Tinggi dalam membenarkan D rayuan perayu, mengetepikan hukuman dan menggantikannya dengan tempoh penjara lima tahun, tanpa denda dan mengarahkan bahawa RM190,000 dikembalikan kepada tertuduh. Maka rayuan ini oleh perayu, yang membangkitkan persoalan awam yang penting, khususnya yang berkaitan dengan prinsip asas hukuman.

E

Diputuskan (membenarkan rayuan)

Ole Low Hop Bing HMR menyampaikan penghakiman mahkamah:

F **(1)** Tertuduh, dituduh di Mahkamah Majistret oleh itu, bidang kuasa hukuman Mahkamah Majistret di bawah s. 87 Akta Mahkamah Rendah 1948 terpakai, di mana ia memperuntukkan hukuman penjara maksimum lima tahun dan denda RM10,000.

G **(2)** Hakim Mahkamah Tinggi, dalam menjatuhkan hukuman lima tahun penjara, mengenakan hukuman penjara maksimum yang mana Mahkamah Majistret sebagai mahkamah yang menjatuhkan hukuman boleh jatuhkan di bawah undang-undang. Hukuman maksimum seperti ini secara sah diperuntukkan kepada kesalahan yang lebih serius, tanpa apa-H apa faktor mitigasi. Yang arif Hakim Mahkamah Tinggi juga tidak mempertimbangkan pengakuan bersalah tertuduh. Dengan demikian, campur tangan mahkamah rayuan adalah wajar.

I **(3)** Adalah undang-undang yang matan bahawa pengakuan bersalah tertuduh merupakan faktor mitigasi; (*PP v. Sau Soo Kim,* dirujuk; *Melvani v. PP* dirujuk). "Pesalah pertama" juga

diambil kira sebagai faktor mitigasi. Pengakuan bersalah oleh perayu membenarkan mahkamah melaksanakan budi bicara dalam memberikan pengurangan sebanyak satu perempat atau satu pertiga daripada jumlah hukuman yang akan dijatuhkan selepas perbicaraan penuh.

(4) Selanjutnya, yang arif hakim telah secara khilaf mempertimbangkan fakta-fakta yang bukan sebahagian daripada fakta-fakta yang diakui dan fakta-fakta yang tidak terdapat di dalam pertuduhan yang dikenakan terhadap tertuduh.

(5) Tertuduh di dalam kes ini telah dipertuduh dengan kesalahan mengeksport ular-ular tersebut tanpa permit dan bukan dituduh dengan "penyeludupan" hidupan liar. Dia telah mengimport secara sah haiwan-haiwan tersebut dan bukan menyeludup masuk ke dalam negara. Juga tidak ada keterangan yang menyarankan bahawa dia tidak akan diberikan permit untuk mengeksport haiwan-haiwan tersebut oleh pihak berkuasa dan juga tidak ada keterangan yang menyarankan bahawa dia sengaja tidak memohon permit tersebut kerana mengetahui bahawa dia tidak akan diberikan permit tersebut.

(6) Tertuduh telah menghabiskan 17 1/2 bulan di penjara kerana tidak ada penggantungan pelaksanaan hukuman penjara diberikan oleh Mahkamah Tinggi. Dalam membenarkan rayuan, mahkamah mengetepikan hukuman penjara lima tahun yang dijatuhkan oleh Mahkamah Tinggi dan menggantikannya dengan hukuman 17 1/2 bulan. Perintah Mahkamah Tinggi mengetepikan denda disahkan kerana denda tersebut jelas melampaui denda maksimum yang boleh dikenakan secara sah oleh Majistret.

Case(s) referred to:
Sau Soo Kim v. PP [1975] 1 LNS 158 FC ***(refd)***
Melvani v. PP [1971] 1 LNS 78 HC ***(refd)***
Mohamed Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 ***(refd)***
PP v. Jafa Daud [1981] 1 LNS 28 ***(refd)***
PP v. Ravindran & Ors [1992] 1 LNS 47 HC ***(refd)***
Zaidon Shariff v. PP [1996] 4 CLJ 441 HC ***(refd)***

Legislation referred to:
International Trade in Endangered Species Act 2008, s. 10(a)
Subordinate Courts Act 1948, s. 87

A *For the appellant - Dato' Sri Dr Muhammad Shafee Abdullah (Sarah Maalini Abishegam with him); M/s Shafee & Co*
For the respondent - Manoj Kurup; DPP

[Appeal from High Court, Shah Alam; Criminal Appeal No: 41H-228-2010]

B *Reported by S Barathi*

JUDGMENT

C **Low Hop Bing JCA:**

Appeal

[1] This Appeal, by the accused against the sentence of five-year imprisonment imposed by the High Court, raises a question of immense public importance, particularly in relation to the fundamental principles of sentencing.

D

Sentence And Factors For Consideration

E **[2]** At the outset, we find it necessary to state that the sentence to be imposed on an accused in each particular case must have a direct bearing on:

(a) the specific charge preferred against the accused;

F (b) the plea of the accused ie, whether he has pleaded guilty or claimed trial;

(c) the facts admitted by the accused who has pleaded guilty or proved against him where the accused had claimed trial;

G (d) the mitigating factors raised for an accused in the court of first instance;

(e) the request of the prosecution in urging the sentencing court to consider an appropriate sentence based on admitted or

H proved facts;

(f) the maximum sentencing jurisdiction of the court of first instance hearing the particular case;

I (g) the exercise of discretion which Parliament has in the specific Act or Acts vested in the sentencing court;

(h) the consideration of all relevant facts and circumstances in imposing an appropriate sentence in each particular case including the balancing of the interest of the public and that of the accused;

(i) the manifest excessiveness or inadequacy of the specific sentence imposed by the sentencing court according to law as enacted by Parliament; and

(j) the aggravating or mitigating factors raised for the prosecution and the accused respectively.

Factual Background

[3] In the instant appeal, originating from the Magistrate's Court, the accused had pleaded guilty without reservation, and indeed unconditionally, to an offence under s. 10(a) of the International Trade in Endangered Species Act 2008 ("s. 10(a)"), to wit, exporting without permit 95 Boa Constrictor snakes ("the snakes") which belong to a scheduled species in the third schedule, appendix 2 to the said Act.

[4] In essence, the facts admitted by the accused revealed that the accused had failed to show any permit under the said Act to export the snakes which were subsequently seized at the Kuala Lumpur International Airport (KLIA) Terminal. The accused had wanted to export those snakes to Jakarta, Indonesia *via* flight MH 727. In short, it was an offence under s. 10(a).

Mitigation

[5] By way of mitigation, the accused's learned counsel submitted in the Magistrate's Court that:

(a) the accused has pleaded guilty as a first offender, thereby saving judicial time and the costs of calling witnesses;

(b) The accused has repented and is remorseful;

(c) The accused has apologised and promised not to repeat the offence in future;

(d) There are no aggravating factors to merit a heavy sentence;

(e) There is no criminal force used, unlike other serious crimes such as murder, rape, robbery and the like;

A (f) The accused has a permit to import the snakes, but does not have an export permit; and

(g) The snakes were found in good conditions and no loss was caused to anybody.

B **[6]** The learned legal adviser who appeared as deputy public prosecutor for the Wild Life Department argued that:

(a) This is a serious offence involving protected species of wild life and the maximum sentence is either a fine of RM1 million or
C seven years imprisonment or both;

(b) Wild life smuggling is serious offence which must be prevented as such activity can bring about the extinction of the species.

D (c) Malaysia and other countries have agreed to co-operate and preserve this wild life species and the said Act was to serve this purpose;

(d) Malaysia should not be made a transit point in the eyes of the international community;

E

(e) This is the accused's first case in Malaysia; and

(f) A deterrent sentence by way of custodial sentence, in addition to a fine, should be imposed so that wild life smuggling is not worth a risk.

F

Sentence Imposed By Magistrate's Court

[7] The learned magistrate has considered the charge, the accused's guilty plea, the exhibits, the submissions of learned
G deputy public prosecutor and defence counsel. He has accepted the accused's guilty plea, convicted and sentenced him to six months imprisonment from 6 September 2010, in addition to a fine of RM2,000 on each of the snakes, amounting to RM190,000, in default of payment of the fine, 12 months imprisonment.

H

Decision Of High Court On Appeal

[8] The learned judge of the High Court allowed the Public Prosecutor's appeal, set aside the sentence imposed by the learned magistrate, and substituted it with a five-year imprisonment
I term, without a fine, and ordered the RM190,000 fine to be refunded to the accused.

Leave To Appeal To Court Of Appeal

[9] Accused has obtained leave to appeal to this court as the apex court for appeals from subordinate courts.

Order Of Court Of Appeal

[10] In the instant appeal, we note that the prosecution has preferred the charge against the accused in the Magistrate's Court. That being the case, the sentencing jurisdiction of the Magistrate's Court under s. 87 of the Subordinate Courts Act 1948 applies. Section 87 sets the ceiling of five year imprisonment and a fine of RM10,000 as maximum sentencing jurisdiction of the Magistrate's Court.

[11] In imposing the five year imprisonment term on the accused, the learned High Court Judge has indeed awarded the maximum custodial sentence which the Magistrate's Court as the sentencing court can impose according to law. This kind of maximum sentence is legally reserved for the most serious offence, without any mitigating factor. We note that the learned High Court Judge's grounds of judgment did not make any reference to the accused's guilty plea. The learned judge does not appear to have taken this into consideration.

[12] It is trite law that the accused's guilty plea is a mitigating factor: See *PP v. Sau Soo Kim* [1975] 1 LNS 158 per Lee Hun Hoe J (B); and *Melvani v. PP* [1971] 1 LNS 78 per Wee Chong Jin CJ (Singapore) (as then was) who also considered "first offender" as another mitigating factor, as has been done by Mohamed Azmi J (later FCJ) in *PP v. Jafa Daud* [1981] 1 LNS 28. As alluded to above, learned deputy public prosecutor has taken the position that "This is the accused's first case in Malaysia".

[13] Generally, the accused's guilty plea also allows the court to exercise the discretion to give a discount or reduction of one-quarter or one-third of the sentence which would have been imposed after a full trial: *Mohamed Abdullah Ang Swee Kang v. PP* [1988] 1 MLJ 167, as followed in *PP v. Ravindran & Ors* [1992] 1 LNS 47.

[14] The sentencing discretion belongs to the court of first instance as the sentencing court: *Zaidon Shariff v. PP* [1996] 4 CLJ 441, 445.

[15] With the utmost respect, the learned judge has erroneously taken into consideration the following factors:

(a) The squeezing of the snakes into a small bag and torturing them, when the facts admitted by the accused did not reveal this;

(b) The two allegedly venomous Rhinoceros vipers which were not in the charge preferred against the accused; and

(c) The accused's greed in profit-making which was again not part of the admitted facts.

[16] It must be emphasised immediately that the accused was charged with the offence of exporting the snakes without a permit. That is the gravamen and substratum of the prosecution's case against the accused who had pleaded guilty to that charge only, and no other.

We wish to also emphasise that the accused was not charged with "trafficking" in wild life. He had lawfully imported the animals into the country with a permit. He had not smuggled the animals into the country. There was no evidence to suggest that he would not have been granted the permit to export the animals by the authorities. There was no evidence to suggest that he intentionally did not apply for the permit because he knew that he would not be granted the said permit. (I am grateful to my learned brother K N Segara JCA who has suggested this passage for inclusion herein as part of our judgment).

[17] Any other considerations would be outside the ambit of the charge and therefore warrant appellate intervention.

[18] We understand that since 7 September 2010, the accused has spent his time in prison ie, for 17 ½ months, as there was no stay of execution of the custodial sentence imposed by the High Court.

[19] In the circumstances, on the facts of this case, we are unanimously of the view that the said 17 ½ months imprisonment would serve the interests of justice.

[20] We therefore allow this appeal, set aside the five year custodial sentence imposed by the High Court and substitute it with a sentence of 17 ½ months ie, the period from 7 September 2010 until today. The accused would walk out of the court today as a free man. The 17 ½ months would translate into a total period of some 23 months if the one-third remission were to be taken into consideration.

[21] In view of the custodial sentence which the appellant has served, we affirm the order of the High Court in setting aside the fine of RM190,000 imposed on the accused as that fine was plainly beyond the RM10,000 maximum fine which the learned magistrate can legally impose.